UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

DAVID R. WATSON, Appellant, v. DEPARTMENT OF THE TREASURY, Agency.	DOCKET NUMBER SL07528810304 DATE: JUN 2 1 1991

Prather G. Randle, Esquire, Memphis, Tennessee, for the appellant.

Eleanor R. Loos, Esquire, Washington, D.C., for the agency.

BEFORE

Daniel R. Levinson, Chairman
Antonio C. Amador, Vice Chairman
Jessica L. Parks, Member

OPINION AND ORDER

The appellant petitions for review of the initial decision, issued October 24, 1988, that sustained his removal from the position of Criminal Investigator (Special Agent) with the Bureau of Alcohol, Tobacco, and Firearms (ATF) in Memphis, Tennessee. For the reasons set forth below, the Board DENIES the petition for failure to meet the criteria for review under 5 C.F.R. § 1201.115. The Board REOPENS this case on its own motion under 5 C.F.R. § 1201.117, however, to address the appellant's claims of

misconduct by the administrative judge and to clarify the administrative judge's finding on the affirmative defense of reprisal. The Board AFFIRMS the initial decision as MODIFIED by this Opinion and Order, SUSTAINING the appellant's removal.

BACKGROUND

The agency removed the appellant, effective June 3, 1988, based on charges of: (1) Engaging in unauthorized outside employment; (2) misusing his official badge, credentials, and position; and (3) conduct prejudicial to the government. The charges arose from the appellant's employment with International Diplomatic Security (IDS) Incorporated -- a private security firm operated by Mr. Mark V. Lonsdale -- as a bodyguard for a movie producer in February 1986, February 1987, and July 1987. The appellant stipulated that he did not seek permission from ATF to engage in this employment, and he contended that authorization was not necessary because he was on annual leave while working for IDS. With regard to the charge that he misused his official badge, credentials, and position, the agency contended that he: (1) Identified himself as an ATF agent on official business so he could bring firearms on commercial airline flights when he traveled from Memphis to his bodyguard assignments in Los Angeles, California; (2) completed a U.S. Customs registration form for his personal guns by using the Memphis ATF address; and (3) expedited the U.S. Customs processing of approximately

thirty people in the producer's group when they returned from a Mediterranean cruise by identifying himself as an ATF agent to the Customs agent and "vouching" for the others in the party. With regard to the charge of conduct prejudicial to the government, the agency raised: (1) The appellant's employment by Mr. Lonsdale, who had been the subject of an ATF investigation and had been deported as an illegal alien in 1983; and (2) the appellant's attempt to bring firearms into Spain, without the approval of Spanish authorities. The agency's deciding official, Watson C. Beaty, did not sustain the specification that the appellant attempted to bring firearms into Spain, but he sustained the three charges and the remainder of the specifications, finding that they warranted the penalty of removal.

The appellant filed an appeal of the agency's action with the Board's St. Louis Regional Office. He alleged that the charges were not substantiated, there was no nexus, and the penalty was disproportionate to his offenses. The appellant also alleged that his removal was retaliation for his involvement in the discrimination complaint of an applicant for employment (hereinafter "the complainant"), who alleged that she had been the victim of sexual harassment during a pre-employment interview, and of retaliation for making the complaint.[1]

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[1] The complainant was the daughter of a former employee of the ATF office in Memphis, and the appellant had encouraged her to apply to ATF and had recommended that she be hired.

After a hearing, the administrative judge found that the agency had proved the charges against the appellant by the preponderance of the evidence. He also found that the appellant had failed to establish his affirmative defense of reprisal. He found that there was an inference of retaliatory motive on the part of the deciding official, Mr. Beaty, because Mr. Beaty knew that the appellant had testified at the hearing of the Equal Employment Opportunity Commission (EEOC) on behalf of the complainant. The administrative judge concluded, however, that there was no causal connection between the appellant's testimony and the inference of retaliatory motive, and, even if there was, that the appellant failed to show that the motive was a significant or substantial factor in the removal action.

On November 27, 1988, the appellant filed a timely petition for review, alleging that, during the hearing, the administrative judge engaged in misconduct which denied him effective representation and that the administrative judge misapplied the law with regard to the affirmative defense of reprisal. In his petition, the appellant stated that he was forwarding the details of his allegations and supporting documentation by separate cover.

The Clerk of the Board received the appellant's brief in support of his petition on December 5, 1988, after the time limit for filing a petition for review, with a new designation of representative and a motion for permission to file the brief out of time. In his brief, the appellant

cited numerous examples of alleged misconduct by the administrative judge and further argued that the administrative judge misapplied the law governing reprisal by limiting consideration of the issue to the appellant's testimony at the EEOC hearing rather than the appellant's complete involvement in the complainant's case.[2] The appellant has also submitted additional arguments that he contends are based on new and material evidence.

The agency has opposed the appellant's motion to file out of time, alleging that the appellant has not established good cause for the untimely submission of points and authorities and supporting documents. The agency has also opposed the appellant's additional arguments, contending that they are not based on new and material evidence. In response to the appellant's petition, the agency contends that the administrative judge correctly applied the law governing claims of reprisal for protected activity to find that there was no causal connection between the appellant's activity and his removal. Furthermore, the agency also asserts that the administrative judge properly exercised his discretion under 5 C.F.R. § 1201.41 in conducting the hearing.

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[2] The appellant has not contested the administrative judge's finding that the agency proved the charges against him.

ANALYSIS

The Board will consider the appellant's memorandum in support of his petition for review.

The appellant filed a timely petition for review, but he filed his memorandum of points and authorities with supporting documentation 7 days later. In his motion to file out of time, he attributed the delay to his difficulty in obtaining stenographic assistance in transcribing the extensive record, his representative's move from offices in Philadelphia, Pennsylvania, to Memphis, and the Thanksgiving holiday. Because his petition for review was timely and his supporting memorandum was filed only a short time later, within the 25-day period in which the record remains open on a petition for review, under the circumstances of this case, we deny the agency's motion to dismiss the additional material as untimely. *See* 5 C.F.R § 1201.114(i).[3]

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[3] We DENY, however, the appellant's subsequently filed Motion to Reopen the Record (Motion to Reopen) based on new and material evidence because we find that the appellant has not established that his additional arguments are based on new and material evidence. *See* Petition for Review File, Tab 9. The appellant contends that the Board should reopen the record based on the court's decision in *Grafton v. Department of the Treasury*, 864 F.2d 140 (Fed. Cir. 1988), which was decided after the issuance of the initial decision in this appeal. He contends that *Grafton* concerns "findings of fact and law directly applicable to the issues pending" in the instant appeal. *See* Motion to Reopen at 1.

Specifically, the appellant contends that both *Grafton* and the instant appeal involve charges relating to the off-duty use of firearms and were based on paragraph 32 of agency ATF Order 3000.1D, which the appellant contends is confusing, and which, he states, provides in part that "[a] special agent shall be armed at all times when actively engaged in law enforcement work and at all other times the agent deems it necessary in connection with official duties." Motion to Reopen at 4. He argues that, as in

The administrative judge did not deny the appellant the effective representation of counsel.

The appellant contends that the administrative judge denied him effective representation of counsel by: (1) Refusing to allow both of his co-counsel to participate in the examination and cross examination of witnesses; (2) preventing co-counsel from conferring; (3) conducting marathon hearing sessions; and (4) requiring oral rather than written closing statements. The appellant also contends that the administrative judge bickered with counsel, encouraged vague answers from the witnesses, and

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Grafton, there was no basis for finding that he had engaged in off-duty misconduct. He contends that the agency applied inconsistent and conflicting interpretations of ATF Order 3000.1D by utilizing it in *Grafton* to cover that appellant's alleged misconduct in ignoring it, while relying on it in the instant appeal to cover his alleged misconduct in relying on it. Motion to Reopen at 5 & n.2.

We find that *Grafton* is distinguishable from the instant appeal. In *Grafton*, 864 F.2d at 142-43, the court found that ATF Order 3000.1D, Chapter C, § 32, quoted above, did not apply to Special Agent Grafton because he was not acting in his official capacity when he fired his service revolver at an intruder at his home. In the instant appeal, however, the agency did not rely on that particular provision of ATF Order 3000.1D in charging the appellant. Rather, the agency relied on portions of the regulation relating to outside employment and general use of badges and commissions. *See* Appeal File, Tab 3, Subtab 3k. We note that it was the appellant who, in his oral response to the charges, first raised the issue of his alleged confusion regarding when to carry a firearm under the regulation. In addressing this issue, the deciding official stated in his final decision that, because the firearms involved in the charges were personal, the appellant "[had] no right to utilize the privileges [i.e., badge, credentials and position] afforded to Government employees in connection with official Government business." *Id.* at Subtab 3c. Thus, the court's decision in *Grafton* has no bearing on the issues raised in the present appeal. Therefore, the appellant has failed to show that the proffered evidence based on *Grafton* is material to his appeal. *See Campbell v. Defense Logistics Agency*, 37 M.S.P.R. 691, 694 (1988); *Russo v. Veterans Administration*, 3 M.S.P.R. 345, 349 (1980).

excluded evidence bearing on the appellant's claim of reprisal. We have reviewed the relevant hearing tapes and the complete transcript, and we find that the appellant's allegations are unsupported by the record.

Under 5 C.F.R. § 1201.41(b), an administrative judge has broad authority to control the conduct of a hearing. *See, e.g., Blain v. Veterans Administration,* 36 M.S.P.R. 322, 327 (1988). The record in this case shows that the administrative judge simply acted to restrict the evidence presented to relevant issues and to avoid delay in the disposition of the proceeding. *See Vires v. Department of the Navy,* 38 M.S.P.R. 569, 573 (1988); *Woo v. Department of the Navy,* 35 M.S.P.R. 317, 320-21 (1987), *aff'd,* 847 F.2d 841 (Fed. Cir. 1988) (Table), *cert. denied,* 490 U.S. 1091 (1989). Moreover, we find that the appellant's representative did not object to the length of the hearing sessions and presentation of oral closing arguments below, and the appellant is therefore precluded from pursuing those arguments here. *See Woo,* 35 M.S.P.R. at 321.

The appellant did object below to the administrative judge's ruling that only one of his co-counsel could speak for him. Hearing Transcript (Tr.) at 210-11. If a party has multiple representatives, an administrative judge must determine the precise role of each representative consistent with the exercise of his adjudicatory authority under 5 C.F.R. § 1201.41. The administrative judge may require that one representative speak for the party for such time as

a given witness is on the stand. The administrative judge, however, may not require that only one representative question all of the witnesses. Representatives should be permitted to divide their work during the hearing as they think best serves their party's interest. Nevertheless, we find that the appellant has not shown that the administrative judge's ruling is a basis for reversal of the initial decision because, while the appellant alleges that the ruling "severely prejudiced [his] case," he has not explained how it harmed his substantive rights. *See* Points and Authorities in Support of Appellant's Petition for Review at 1-2. *See Karapinka v. Department of Energy*, 6 M.S.P.R. 124, 127 (1981).

The appellant has failed to establish a causal connection between his protected activity and his removal.

The appellant asserts that the administrative judge erred by not considering the appellant's claim that the agency retaliated against him because of his "opposition" to the agency's discriminatory activities with regard to the complainant as well as his participation as a witness in the EEOC hearing on her complaint of discrimination. In addition, the appellant alleges that the administrative judge erred in excluding testimony from other witnesses in the complainant's hearing, who would have testified that the agency retaliated against them for their participation.

Contrary to the appellant's assertion, the administrative judge allowed him to proceed in his attempt to establish reprisal on the basis of the appellant's total

involvement in the complainant's EEO case. Tr. 163-64. With regard to the appellant's claim that the administrative judge prevented the appellant from introducing evidence that the agency retaliated against other ATF employees who had participated in the case on her behalf, the appellant had withdrawn his request for those employees as witnesses and raised no objection when the administrative judge so stated during the hearing. Tr. at 9-10. *See Sofio v. Internal Revenue Service*, 7 M.S.P.R. 667, 670 (1981) (the appellant is responsible for the errors of his chosen representative).

Although the appellant has established that the proposing official was aware of his complete involvement in the complainant's effort to be hired by ATF and her subsequent complaint of discrimination and reprisal, the appellant has failed to show that Mr. Beaty, the deciding official, was aware of the appellant's opposition to the agency's actions with regard to the complainant. Mr. Beaty testified that the decision to remove the appellant was his decision, not the result of influence by other agency officials. Tr. at 234-36; 259-60. He also testified that he was not personally involved in the complainant's case. Tr. at 237. Even if other agency officials engaged in a conspiracy against the complainant, the appellant has failed to establish a connection between that alleged conspiracy and the decision to remove him for his misconduct. *See Warren v. Department of the Army*, 804 F.2d 654, 656-58 (Fed. Cir. 1986). In any event, we find that the record as a

whole establishes that the agency would have taken the same action even if the appellant had not supported the complainant. *See Cancio v. Department of the Army*, 36 M.S.P.R. 64, 66 (1988).

ORDER

This is the final order of the Merit Systems Protection Board in this appeal. 5 C.F.R. § 1201.113(c).

NOTICE TO APPELLANT

You have the right to request further review of the Board's final decision in your appeal.

Discrimination Claims: Administrative Review

You may request the Equal Employment Opportunity Commission (EEOC) to review the Board's final decision on your discrimination claims. *See* 5 U.S.C. § 7702(b)(1). You must submit your request to the EEOC at the following address:

Office of Review and Appeals
Equal Employment Opportunity Commission
P.O. Box 19848
Washington, DC 20036

You should submit your request to the EEOC no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. *See* 5 U.S.C. § 7702(b)(1).

Discrimination and Other Claims: Judicial Action

If you do not request review of this order on your discrimination claims by the EEOC, you may file a civil action against the agency on both your discrimination claims and your other claims in an appropriate United States

district court. *See* 5 U.S.C. § 7703(b)(2). You should file your civil action with the district court no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. See 5 U.S.C. § 7703(b)(2). If the action involves a claim of discrimination based on race, color, religion, sex, national origin, or a handicapping condition, you may be entitled to representation by a court-appointed lawyer and to waiver of any requirement of prepayment of fees, costs, or other security. *See* 42 U.S.C. § 2000e5(f); 29 U.S.C. § 794a.

Other Claims: Judicial Review

If you choose not to seek review of the Board's decision on your discrimination claims, you may request the United States Court of Appeals for the Federal Circuit to review the Board's final decision on other issues in your appeal if the court has jurisdiction. See 5 U.S.C. § 7703(b)(1). You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you

personally, whichever receipt occurs first. *See* 5 U.S.C. § 7703(b)(1).

FOR THE BOARD:

for Robert E. Taylor
Clerk of the Board

Washington, D.C.